United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 4, 2008

TO : Michael W. Josserand, Regional Director

Region 27

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: The Newspaper Agency, Corp. LLC 530-8045-3725

Case 27-CA-20748 775-8731

This case was submitted for advice as to whether the Employer was privileged to unilaterally create new layoff procedures and lay off employees based on the Management Rights provision in a collective-bargaining agreement that had otherwise expired. We conclude that the Employer was privileged to unilaterally create new layoff procedures and lay off employees, as the parties' collective-bargaining agreement provided that the Management Rights provision would continue to be in effect after the agreement's expiration.

FACTS

The Newspaper Agency, Corp. LLC (the Employer) publishes 2 daily newspapers in Salt Lake City Utah. Salt Lake City Mailers Union No. M-21/CWA 14759 (the Union) represents the Employer's mailroom employees. In December 2005, the Employer and the Union executed a new two-year collective-bargaining agreement scheduled to expire on December 11, 2007.² That Agreement included the following Management Rights provision:

Section 1. The Union recognizes that any and all rights concerned with the management of the business and the direction of the workforce are exclusively those of [the Employer]. [The Employer] retains all of its normal, inherent common law rights to manage the business, whether or not exercised as such rights existed prior to the time any Union became the bargaining representative of the employees covered by this Agreement, except as limited by, and consistent

¹ The Region has concluded that, if the Management Rights provision survived the expiration of the parties' agreement, the Employer did not violate the Act by unilaterally creating the new layoff procedures and laying off employees.

² All dates hereinafter are in 2007, unless otherwise noted.

with the rights of the Union and its represented employees as set forth in this Agreement or as established by law, statutes and governmental regulations. The sole and exclusive rights of management shall include, but are not limited to the right to: hire, assign, schedule, layoff, recall, transfer, suspend, discharge, or otherwise discipline employees for just cause, determine, establish, and implement terms and conditions of employment; establish or continue policies, practices and procedures for the conduct of the business and, from time to time, to change or abolish such policies, practices or procedure in order to prevent any redundancy or duplication of work or for any other reason provided such rights and policies are not in conflict with any provision of this Agreement and do not abridge the rights and benefits of employees as conferred by this Agreement; . . . take any other measures which are reasonable and necessary for the orderly, efficient and profitable operation of its business.

* * * * *

Section 3. The parties agree that the management rights referenced in this Article or elsewhere in the Agreement shall continue after the expiration of this Agreement and shall not expire upon expiration of this Agreement.

The Management Rights provision is the only portion of the Agreement that, by its terms, survives the expiration of the Agreement.

On August 27, the Union notified the Employer that it wished to begin negotiations for a new collective-bargaining agreement. On August 30, the Employer gave its notice of termination of the Agreement and stated that, upon the Agreement's expiration:

all contractual obligations of the current Agreement shall expire and become null and void. After the Agreement expires, the Company will continue to observe all established wages, hours and terms and conditions of employment as required by law except those recognized by law as strictly contractual. With respect to arbitration, the Company will decide its obligation to arbitrate grievances on a case-by-case basis.

The letter made no explicit reference to the Agreement's Management Rights provision.

On October 9, the parties commenced negotiations. No new agreement had been reached by December 11, at which time the Employer gave notice to the Union that the Agreement had expired and repeated, verbatim, the above language regarding its obligation to continue to observe all established wages, hours and terms and conditions of employment as required by law, except those recognized by law as strictly contractual, as well as that the Employer would decide its obligations with respect to arbitration on a case-by-case basis. According to the Employer, the intent of the December 11 letter, as with the August 30 letter containing the same language, was solely to address arbitration of post-expiration grievances, a subject the Supreme Court and the Board have recognized as solely contractual. Again, the letter made no explicit reference to the Agreement's Management Rights provision.

Later in December, the Employer announced its intention to lay off a number of its mail room employees. Union representatives asked the Employer to make the layoffs according to the Priority provision contained in the recently expired Agreement, which provides that employees shall have the right to bid for new shifts based upon their continuous service as mailroom employees. The Employer rejected that request. On January 2, 2008, the Employer laid off seven employees chosen according to a rating system created by the Employer without any input from the Union. According to the Employer, this system considered factors such as the employees' attendance records and their ability to perform their work and operate required equipment.³

On January 4, 2008, the Union filed grievances as to each of the layoffs, contending that the Employer did not terminate the employees for just cause. On January 11, 2008, the Employer denied the grievances, asserting that the employees had been part of a layoff. As the layoff occurred after the Agreement had expired, the Employer refused to take the grievances to arbitration.

On January 15, 2008, the Union filed the charge in the instant case alleging, <u>inter alia</u>, that the Employer violated Section 8(a)(5) of the Act by creating and implementing a new procedure for laying off the mailroom

³ In addition to arguing that the Employer should have structured its layoffs based on the Priority clause of the contract, the Union also contends that employees were selected for layoff because of their Union membership. The Region's investigation did not establish that any of the employees were laid off for discriminatory reasons.

employees without bargaining with the Union. The Employer asserts that it was privileged to unilaterally determine the layoff procedures by the Management Rights provision in the expired Agreement, which expressly states that it remains in effect after the Agreement's expiration.

ACTION

We conclude that the Employer was privileged to unilaterally create new layoff procedures and lay off employees, as the parties' Agreement provided that the Management Rights provision would continue to be in effect even after the agreement's expiration.

It is well established that while a waiver of bargaining rights contained in a contractual managementrights provision is generally limited to the effective period of the collective-bargaining agreement in which it appears, the parties may agree to extend the waiver beyond the expiration of the agreement. 4 In the instant case, it is undisputed that the parties agreed in 2005 that the Management Rights provision would continue in effect beyond the expiration of the contract in 2007. Indeed, this extension is set forth in Section 3 of the Management Rights provision itself. As the Management Rights provision expressly grants to the Employer "the sole and exclusive right" to lay off employees, we conclude that the Employer was privileged to act unilaterally and did not violate the Act by non-discriminatorily laying off seven employees in January 2008 based on the Management Rights provision.

The Region suggests that the Employer might have terminated the Management Rights provision by its August 30 and December 11 letters stating that, after the Agreement expired, the Employer would not continue to observe employment terms recognized by law as strictly contractual. Thus, since the waivers contained in "management rights" provisions are generally considered to be "strictly contractual," the Employer could have intended to rescind

⁴ See, e.g., <u>Blue Circle Cement Co.</u>, 319 NLRB 954 (1995) ("a contractual reservation of managerial discretion does not extend beyond the expiration of the contract unless the contract provides for it to outlive the contract"); <u>Paul Mueller Co.</u>, 332 NLRB 312, 313 (2000), quoting <u>Ironton Publications</u>, 321 NLRB 1048 (1996) ("the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intention to the contrary").

the otherwise surviving Management Rights provision in the expired Agreement.

We reject this argument on several grounds. First, the Employer did not expressly or implicitly state that it was terminating the Agreement's Management Rights provision, or even refer to it in any way in either of the two letters. To find that the provision was terminated merely by the Employer's general statement that it would no longer observe "strictly contractual" obligations after the Agreement's expiration would clearly contradict the parties' intent in specifying that the provision survived contract expiration. Second, there is no other evidence that indicates that the Employer intended the letters to terminate the Managements Rights provision. In this regard, the Employer's explanation that it intended only to address its obligation to undertake arbitration of postexpiration grievances is more plausible than that it intended to unilaterally terminate its own discretionary rights. Finally, there is no evidence that the Union understood the Employer to have intended to terminate the Management Rights provision.

Therefore, we conclude that the Employer did not unilaterally terminate the parties' Management Rights provision by its August 30 and December 11 letters. While giving continuing effect to the Management Rights provision may create a harsh result for the Union, it is the result required by the contractual scheme to which the Union agreed. The Employer cannot be found to have violated the Act by acting in accordance with the parties' Agreement.⁵

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal, as the Employer was privileged to act unilaterally under the parties' Management Rights provision.

B.J.K.

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⁵ Given our conclusion that the Employer was privileged to act unilaterally based on the Agreement's Management Rights provision, we need not address the Employer's alternate argument that the Union waived bargaining over the layoffs in any case by failing to timely request bargaining.